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PROFESSOR KALES AND COMMON LAW REMAINDERS

IN an article in Vol. 22 of the *Law Quarterly Review*,[1] Professor Albert M. Kales presents a reclassification of future interests in land, the salient feature of which is an attempt to overthrow the conventional conception of a contingent remainder as a future estate given, not presently, but on condition precedent, and to substitute an entirely new conception of his own. This effort, by its boldness and novelty commands something more than a mere passing mention. It is my purpose, first to present as briefly as is consistent with clearness what I conceive to be the common law theory of estates in land and the nature of remainders, vested and contingent; and then to discuss Professor Kales' article with like brevity and attempt to show how and why he has wandered from what I conceive to be the beaten path, trodden by our law-makers.

I.

In the early stages of the development of our law, an essential element of ownership was possession or seisin (either actual or by proxy) of the property object. This is a fact which must not be lost sight of, if one is to comprehend the old real property law or the reasons which underlie many of the technical rules which are still effective today and which superficially appear to us so arbitrary and in discord with common sense. So accustomed have we become to incorporeal property, entirely dissociated from any direct control over physical objects of property that a system of law which refused to consider that one who had been deprived of possession of his chattel or of his land had any ownership in it, is apt to strike us as arbitrary and unnecessarily technical. Yet if we permit the imagi-

[1] L. Q. Rev., Vol. 22, pp. 250 and 363.

nation to disentangle the mind from the conventional legal conceptions which have been developed to satisfy the social needs of our present state of civilization and try to look at the matter from the environment, social, political, and legal, of the English lawmakers of the 12th and 13th centuries, we must come to a different conclusion.[2] When the word "property" conveyed the idea of some *thing* controlled as one's own, it was natural that the courts should hold that loss of property resulted from loss of control over the thing. How could a man be said to have that which another had? How could a thing be conveyed by one who no longer had it within his control? One in such a situation was no longer owner of the thing; he still had rights with respect to it, but his rights were merely rights of retaking or rights of action.[3]

This explains why seisin played so important a role in the old real property law.[4] An estate in land was property. In order that one have an estate, it was necessary that he have seisin of the land, either actual or by proxy.[5] If he lost his seisin, he lost his estate. If wrongfully disseised, he had a right of entry (either in himself or by proxy) to recover his property, but no ownership which he could convey or transmit to his heir.[6] Bearing this fact in mind, let us now examine the old common law theory of estates in land.

Estates in land had their origin in infeudation under the feudal system of the Middle Ages. A landlord would enfeoff a person of an interest in the land of a stipulated duration and give him seisin.

[2] The English judges of the Middle Ages were not, as is often assumed, mere metaphysicians whose labors balked the purposes of justice through philosophical subtleties. They were hard-headed practical men of affairs; and the law they promulgated and developed was a law that, however pedantic and whimsical may be the garb in which we find it decked out in the inadequate reports and rude treatises that have come down to us, had as its foundation, reasons of judicial policy, as sound and practical, no doubt, from the view-point of the time when it was made, as are those which underlie the decisions of the courts which are making our law today.

[3] See the able articles by Professor James Barr Ames, on "The Disseisin of Chattels," in 3 Har. L. Rev. 23, 313, 337. See also "The Conveyance of Lands by One Whose Lands are in the Adverse Possession of Another," by George P. Costigan, Jr., in 19 Har. L. Rev. 267.

[4] "In the history of our law there is no idea more cardinal than that of seisin. Even in the law of the present day it plays a part which must be studied by every lawyer; but in the past it was so important that we may almost say that the whole system of our land law was about seisin and its consequences." (2 Poll. and Mait. Hist. Eng. Law, 29.)

[5] Or, as the books have it, seisin either "in deed" or "in law."

[6] If his estate had been a fee and if he died before reentry, his heir would have a right to recover the land; but this right would exist in the heir, not as owner of the land, but as representative of his ancestor. Therefore, if the heir died before recovering the land, the right of recovery would descend, not to his heir, but to whomsoever then might be the legal representative of the person last seised. (See the first, fifth, and sixth of Blackstone's Canons of Descent: II Bl. Comm. 209 et seq.; 4 Gray's Cas. Prop. 9.)

The feoffee then would be owner of the land; but the landlord too would still be owner. The feoffee would have an "estate" in possession in the land and would have actual seisin; but inasmuch as he would hold the land by tenure under the landlord, the landlord also would be considered as having seisin "in law" through the seisin of his tenant. Important among other rights of the landlord in such a case, was the right to have the land "revert" to him or his heir whenever the particular estate in the tenant should expire. Hence the landlord's ownership in the land came to be designated an "estate in reversion."[7]

Now let us suppose that in the early days L, a landowner in fee simple in possession, desired to give to B an estate for life in possession, and to A an estate in fee simple dependent upon the termination of B's life estate. He might accomplish the desired result by the process of sub-infeudation—conveying the land to A in fee simple and requiring him, upon receiving seisin, to convey immediately to B for life. The result of such a process would be that B would have the actual seisin of the land as tenant for life and A would have a fee simple in reversion. A would have the right to take possession of the land immediately upon the termination of the preceding estate in B, which had been "carved out of it." But this was a cumbrous method; so the courts in time permitted L to accomplish his purpose by giving seisin of the land directly to B and limiting in the charter of feoffment a life estate to B, and to A the "remainder" of the fee. Since by this process B would receive the land from L and not from A, no tenure would be created between A and B; but nevertheless, the courts held that B, under the terms of the feoffment, was bound to hold the seisin for A, the remainderman, so that A was considered to have ownership of the land just as a reversioner has ownership. Because he was "invested" with seisin of the land "in law," his remainder was said to be "vested."

The introduction of the remainder, being due merely to a simplification of the method of creating a string of successive estates, did not modify radically the law of future interests in land. For every estate which was limited as a vested remainder, an analogue might have been created as a reversion in a more roundabout manner. A remainder, then, was analogous to a reversion in that it was an *estate* which, during its existence, gave its holder the right to take possession of the land *whenever and however* the preceding estates

[7] The Statute Quia Emptores abolished sub-infeudation in fee simple. One who conveys land in fee simple, therefore, cannot possibly retain ownership at law in it. If a fee simple determinate is conveyed, the grantor retains a "mere possibility of reverter" which is untransferable according to the better view.

should expire according to the terms of their limitations. In theory the precedent estates were "carved out of" the remainder, as precedent estates are carved out of a reversion. If the learning of the subject is canvassed, it will be found that the criterion for deciding whether or not a limitation creates a *vested* remainder is simply this: If the terms of the limitation, properly interpreted, disclose an intent that an ascertained person (or ascertained persons) shall have *at once* an interest in the land limited to "succeed" the precedent estate, just as a reversion succeeds the estate preceding it, the interest limited is a vested remainder; if the limitation does not disclose such an intent, the interest limited is not a vested remainder. If we firmly grasp this fact, I think we can readily appreciate that the difficulty involved in the cases is not one of defining vested remainders and distinguishing them from contingent future interests, but is merely one of correctly construing the language of the limitations.

Apparently for some time after the vested remainder was introduced, the courts refused to hold valid, attempted limitations of future interests in land which did not conform to the requirements of a vested remainder. As early as the fifteenth century, however, a new sort of future interest was introduced. In order that we may have a clear conception of the nature of this new sort of interest, let us examine the following four types of limitations:

I.—"To B for life until S returns from Rome; when S returns from Rome, then to D and his heirs." Since, according to the terms of the limitation, D is to have the land, not simply upon *any* termination of B's estate, but only upon one of its possible terminations —that through D's return from Rome—the limitation to D cannot be a vested remainder.

II.—"To A for life; at A's death to B for life, but if B dies before A, then to C for life." The words of the limitation do not specify that C is to take the land upon the termination of the preceding estates; he is to have the land upon the termination of A's estate only upon condition that A survives B. An interest thus limited is not at all analogous to a reversion and therefore cannot be a vested remainder.

III.—"To A for life; remainder, after the death of S, to B and his heirs." In this case also, it is evident from the words of the limitation that B is not to have the land upon the termination of A's estate merely; he is to have it only after the death of S has also occurred. Therefore B does not take a vested remainder.

IV.—"To A for life; then to the heirs of B (a living person)." A vested remainder is property and the existence of property pre-

dicates the existence of an owner. Until B dies and his heirs are thus ascertained, there is no one who can show that he is owner of the future interest limited. Therefore it is not a vested remainder.

Though the limitations of future interests set forth above are not vested remainders, each may be construed to be an attempt to give a vested remainder, not presently, but on condition precedent. Thus limitation IV may be construed to be an attempt to give a vested remainder subject to the necessary condition that the remainderman be first ascertained. Limitations II, III, and I may be similarly construed. It was this construction that the courts placed upon these limitations; and construing them thus, they finally held them to be effectual to raise a new sort of future interest which gave the designated recipient a right to be considered a vested remainderman as soon as the condition precedent fixed by the terms of the limitation should occur. This new sort of interest was called a contingent remainder. It was not property. The person who had a contingent remainder had no ownership in the land—he couldn't have because he had no seisin; he had a "mere possibility" of becoming owner upon the occurrence of the specified contingency. A limitation, then, is a contingent remainder when, properly construed, it amounts to a designation that a person (ascertained or not) is to have a vested remainder upon the occurrence of some contingency (which may be merely the ascertainment of the remainderman) not contrary to "public policy."[8]

II.

According to Professor Kales, there are "three different lines of distinction between vested and contingent remainders, that is to say, (a) the modern or non-feudal, (b) the feudal or common law distinction, and (c) a line of distinction peculiar to some States, and especially Illinois." The third "line of distinction" mentioned has no particular bearing on the purposes of this article and will therefore not be considered.[9] In his exposition of the other two "lines of dis-

[8] If the contingent remainder did not become a vested remainder before or immediately upon the termination of the preceding estates, it failed. The courts would not go so far as to permit an effective limitation in defeasance of another estate. This would have been a decided innovation. Neither would the courts hold the "seisin in abeyance" after the termination of the particular estate until the contingency occurred or became impossible. In addition to being an innovation, such a course was decidedly against public policy, which obviously demanded that land should have an owner with present rights of control and possession.

[9] I should like, however, to raise a question concerning this third "line of distinction":

Is Professor Kales right when he says that the decisions to which he refers have created a new "line of distinction" between vested and contingent remainders in certain jurisdictions? Isn't it true that the only thing new in these decisions is the

tinction" Professor Kales developes his novel view of the relative characteristics of contingent and vested remainders.

He defines his first "line of distinction" as follows:

"In a system of law newly created and consistent with modern notions and conditions, it is believed that any distinction between vested and contingent remainders would be simply a distinction between those future interests by way of succession after a particular estate of freehold which are sure to take effect, and those which are not. In short, the distinction would be between those which are non-contingent and those which are contingent. Courts today are, it is believed, frequently to be found using the terms vested and contingent in such a sense."

It is difficult to conceive of a future interest known to our present law which would fall on the "vested" side of this line of distinction. No future interest is absolutely certain to come into possession. Even a fee simple in remainder may expire by the death of the owner without leaving an heir, before the termination of the preceding estates.[10] If the owner is a corporation, it may be dissolved or may voluntarily transfer the remainder which may then expire before

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construction of the limitations? I think Professor Kales would find it a very difficult task to prove that the contingent remainder which courts today recognize by their decisions in any given jurisdiction, is a different sort of interest, as far as the characteristics of its limitation are concerned (of course in the matter of alienability and destructibility the "modern" contingent remainder differs greatly from the "feudal"), from the contingent remainder of the 16th century. It is true that the courts of some jurisdisdictions have construed limitations of future interests in a way that time-honored precedents would not indicate as conventional; but I think that if the decisions are scrutinized, it will be found that the courts have adjudged merely (in some cases because of a statute) that the intent expressed by the deed or the will was to give presently to an ascertained person a vested remainder (of the old "feudal" brand)—not to give a "mere possibility" of having a vested remainder upon the occurrence of a specified contingency to a person ascertained or unascertained. Indeed, in discussing the similar cases in which the New Hampshire court departed from precedent in holding certain limitations to raise contingent remainders, Professor Kales himself points out that the departure was merely in the matter of construction of language. (See 22 L. Quar. Rev. at bottom of p. 387.)

[10] Professor Kales might contend that the fee simple in remainder would go to the State as "ultimam heredem." In many jurisdictions today, perhaps there is nothing incongruous in considering the State to take a "fee simple estate" by escheat. If we yield to such a contention, then all fee simple absolute estates in remainder or reversion in land in those jurisdictions would satisfy the "modern" conception of a vested remainder. But still there would remain to be answered the question: Why draw such a line of distinction? Of what practical legal importance is it?

When Professor Kales says: "Courts today are, it is believed, frequently to be found using the terms vested and contingent in such a sense," doesn't he mean merely that courts frequently use the word "contingent" when they are not drawing a line between vested and contingent remainders, but are only indicating that the interest under discussion is not reasonably certain of ever entitling its owner to actual possession of the land, and further, that judges sometimes use the word "contingent" as they sometimes use other legal terms, loosely and without any well-defined meaning?

the expiration of the preceding estates. If there is a valid restraint on the alienation of a remainder held in trust, a conveyance may be made in violation of the trust and of the restraint to a bona fide purchaser for value without notice. The estate may then be brought to a termination before the preceding estates run out, either by means of the restraining clause or as indicated in the two preceding examples. If Professor Kales means by "sure" something short of absolute certainty, where would he draw the line? Suppose, for instance, the land is in the possession of a healthy young man who is tenant for life and the remainderman in fee is old and an invalid, has no relatives, and refuses to make a will or conveyance. Would this remainder be vested or contingent according to "the modern line of distinction?" If vested, would it become contingent when the old man is drawing his last breath?

Isn't it true that it is impossible to imagine what the difference between contingent and vested remainders would be "in a system of law newly created" until we know something of the system and of the reasons which might demand that a distinction be drawn? A difference between the characteristics and attributes of classes of property interests is based on some underlying consideration of practical importance. Until we know the considerations which call for a line of distinction, we cannot apprehend where to draw the line. The reasons for the existence in our present-day law of two classes of remainders are found in the history of the development of the common law. Those reasons and the respective nature of each class, I have endeavored to indicate in Part I, *supra*.

After a vigorous attempt to turn the flank of the authorities, Professor Kales evolves the following statement of his conception of "the feudal or common law distinction":

"Vested remainders are (a) those future interests after a particular estate of freehold, which are sure to take effect in possession, and when they do, must so take effect by way of succession, and (b) those which, while not sure ever to take effect in possession, are bound by the expressed terms upon which they are limited to do so, if at all, by way of succession. Contingent remainders, on the other hand, include those future interests after a particular estate of freehold, which, if they take effect as expressly limited, may do so by way of succession or interruption, according as the event upon which they are limited happens before, or at the time of, or after the termination of the preceding interest, but which according to a rule of law, must take effect by way of succession or fail entirely."

It will be observed that under this definition the remainders in the following limitations would be vested:

"To A for life; remainder to B's heirs, providing they are ascertained at the time A's estate terminates." B is living at the time the conveyance or devise takes effect.

"To A for life until S returns from Rome; when S returns from Rome (providing this happens before the termination of A's estate) to B for life."

Yet, unless I utterly mistake Professor Kales' meaning, he would hold the remainders in the following limitations to be contingent:[11]

"To A for life; remainder to the heirs of B" (B being a person alive at the time the conveyance or devise takes effect).

"To A for life until S returns from Rome; when S returns from Rome, to B for life."

The difference between the first two and the second two limitations is that each of the first two contains a proviso to the effect that the remainder is to fail unless the contingency happens before the termination of the preceding estate, whereas neither of the second two limitations contains such a proviso.

I think that Professor Kales shows conclusively that he makes the answer to the question: Vested or contingent remainder? turn entirely on whether or not the language of the limitation, properly interpreted, sufficiently negatives any intent on the part of the grantor or devisor to have the remainder come into possession by way of interruption, contrary to law. If this criterion is the correct one, then conveyancers labored diligently for centuries to avoid the perils of the contingent remainder, when, by a judicious use of language, they might have abolished it.

Professor Kales concludes his article as follows:

"The objection to the usual attempted distinction between vested and contingent remainders (assuming it to avoid the error of suggesting that it is fundamentally a distinction between contingent and non-contingent interests after a particular estate of freehold) is that the language bears on its face absolutely no suggestion of a reason for the distinction described.[12] One may even read Professor

[11] Not to do so would be to impale his theory upon the authorities.

[12] Professor Kales is right in charging that the usual definitions of the difference between vested and contingent remainders do not disclose the reasons for the difference which they state. Many writers have unwittingly clouded the matter by contenting themselves with indicating the superficial attribute of a vested remainder, that it entitles its holder to immediate possession of the land upon any termination or forfeiture of the preceding estates during its existence, instead of *explaining its nature as a future estate.* Consequently, one is apt to get the impression that the rules governing the effect of a limitation of a future interest are somewhat artificial and scholastic. We never comprehend the law unless we know the reason therefor.

It was probably these blind definitions that led Professor Kales into the erroneous conclusion that a future interest cannot be a vested remainder unless a proper interpretation of the terms of its limitation discovers a specific intent that it shall "come into

Gray's exposition, which appears to the writer to be one of the most illuminating, and yet come away without the slightest idea of the reason for making the distinction indicated. * * * The reader may look in vain for an explanation of the reason upon which it is based. It is no excuse to say that the definition is the result of feudal conceptions, for even feudal rules have a reason which can be understood to some extent today. * * * This (Professor Kales') method of exposition has, it is believed, not only given the distinction an historically rational basis for existence, but has resulted in more clearly divorcing the distinction itself from questions of construction and expressing the distinction in terms of a formula as mathematical and certain as the Rule in Shelley's case or the Rule against Perpetuities."

It appears from this passage that he objects to the orthodox distinction between vested and contingent remainders because it is apparently without reasonable foundation and that his purpose was to supply a new distinction which should not be subject to criticism on this ground. Has he succeeded? Is it conceivable that, in drawing a distinction with practical consequences as important as had that between vested and contingent remainders, courts should be actuated by any such whimsical conceit as Professor Kales attributes to them? Which is the more reasonable explanation of the matter—the orthodox view which I have attempted to set forth briefly, or the view which Professor Kales offers us in his article?[13]

possession" upon a premature termination of the precedent estates as well as upon any natural termination,—an idea which is a prominent feature of the system by which he disposes of the authorities that menace his theory. As a matter of fact, the right of a holder of a vested remainder to take the land upon a premature termination of the precedent estate is not founded upon any designation in the limitation that he may do so; it is an attribute which attaches to the interest as a *result* of its character as a vested remainder.

[13] Furthermore, Professor Kales bases his whole argument on the assumption that remainders at common law could take effect only "by way of succession"; but he neglects to give us a satisfactory reason for this basic principle. He admits that some future interests valid at common law took effect by way of interruption; why then did the law demand that remainders should take effect only by way of succession? "It is no excuse to say that the definition is the result of feudal conceptions, for even feudal rules have a reason which can be understood to some extent today."

As a matter of fact, even a remainder did not always come into possession "by way of succession." A remainderman might enter on the land and take possession because of some act of the tenant which entitled the holder of the next vested interest to enforce a forfeiture. In such a case the remainder would "come into possession" "by way of interruption."

Mr. Edward Jenks, in the passage of his article (L. Q. R. XX, p. 280), from which Professor Kales starts his argument, merely suggests concerning remainders, that they are *limited* "by way of succession"—that is to say, "laid" in the limitation to "succeed" the preceding estate without "lap or gap," as one rail of a railroad track succeeds another. Professor Kales seizes upon this suggestive statement and interprets it to mean that a remainder *must "take effect"* "by way of succession"—an interpretation which renders the

If we come to what I regard as the inevitable conclusion, that Professor Kales' argument is fundamentally erroneous, can we find a reason for his departure from the straight and narrow path of precedent? Two facts strike me as suggestive. The first is that nowhere throughout his exposition does he give us an explanation of why vested remainders were termed "vested." The second is illustrated by the following extract from his article:[14]

"It is believed, therefore, that the true test is not the mere form of words, but the actual effect of the expressed language in requiring the future interest to take effect by way of succession, if at all, or giving it the chance of taking effect by way of interruption. It is believed, therefore, that the remainder may be subject to a condition in substance and in form precedent, and yet it may, according to the feudal distinction, properly be called vested. Thus, if the gifts be to A for life and if B survive the termination (whenever and in whatever manner) of A's life estate, then to B and his heirs, B's interest must in the proper feudal sense be called vested.

"The error in making the test the mere form of words is that it imposes to an appreciable extent upon the purely feudal conception of vested and contingent remainders a modern or non-feudal distinction—rational enough today—between contingent and non-contingent future interests. Professor Gray apparently starts with the idea that all remainders in fact subject to a condition precedent in fact to their taking effect in possession, might logically have been called contingent remainders.[15] This is equivalent to saying that

passage inaccurate as a statement of the law. Throughout his article, Professor Kales displays remarkable vigor and ingenuity in turning their own guns against the enemy. Unfortunately, however, in almost every case he has first unwittingly spiked them by misinterpretation.

[14] L. Q. Rev., Vol. 22, p. 390 (bottom of page).

[15] I think that Professor Gray gives Professor Kales some grounds for this assertion. (See Gray's Rule Against Perpetuities, Secs. 100 to 109.) It is difficult to obtain from Professor Gray's exposition a clear conception of the difference between "vesting in interest" and "vesting in possession"; and one easily might be misled by some of the things he says to suppose that the condition which makes an interest a contingent remainder is a condition precedent to coming into possession of the land. This is, of course, not true, as Professor Gray himself would doubtless agree. All future interests are subject to this sort of a condition precedent.

Let us examine, for instance, Secs. 104 and 105 of Professor Gray's book on Perpetuities, which Professor Kales criticizes with cause, I think, but incorrectly:

"One class of cases, however, presents some difficulty, those, namely, in which the contingency, if it happens at all, must happen at or before the termination of the particular estate, and the coming into possession of the remainder. Suppose, for instance, a gift to A for life, remainder to B and his heirs, but if B dies before the termination of the particular estate, then to C and his heirs. Here, if the condition ever affects B's estate at all, it will prevent it from coming into possession; it will never divest it after it has once come into possession. Remainders subject to conditions of this sort might have been regarded in three ways.

the feudal law might have adopted the purely modern line of distinction. Then Professor Gray seems to intimate that calling the remainder vested, because the condition is expressed in form as subsequent, is a relaxation of the view logically correct from the feudal point of view, due to the preference of the law for vested interests. This, it is submitted, is incorrect. The modern line of distinction between contingent and non-contingent remainders is entirely irrelevant. The feudal or common law distinction between vested and contingent remainders was not at all built upon a distinction between contingent and non-contingent future interests."

I think that this quotation, as well as other portions of Professor Kales' article, shows pretty conclusively that he misconceives the

"(1) If the law looked on vested and contingent interests with an impartial eye, it would seem that such remainders should be held contingent. A condition which may prevent an estate coming into possession, but which can never divest it after it has come into possession, is a condition in its nature precedent rather than subsequent. But the preference of the law for vested interests has prevented this view being adopted."

I think this passage is especially capable of misleading the unwary reader. Isn't Professor Gray in error when he says that the remainder to B is subject to a condition "in its nature" precedent rather than subsequent? If we assume for the moment that the courts are right in interpreting the *intent* expressed by the limitation to be that B shall have *present ownership* in the land instead of a "mere possibility" of ownership in the future, of what further materiality on the question of the nature of B's interest, is the fact that the happening of the contingency on which C's interest is limited will operate a defeasance of B's estate *before* it "comes into possession" instead of *after* it comes into possession?

Suppose C passes title to a chattel to B presently but with a condition subsequent attached that title is to revest in C upon a specified contingency. Assuming that the condition is valid, does it make any difference, with respect to the question whether or not B has title to the chattel before the contingency occurs that there is a further effective stipulation that B is not to have possession of the chattel until the contingency occurs or becomes impossible? Would such a stipulation change the "nature" of the condition from subsequent to precedent? Isn't this case analogous to the limitation discussed by Professor Gray? In each case, of course, there is a condition precedent "in fact" to the "coming into possession" of B's interest. But, I repeat, every future interest in land is subject to a condition precedent of this sort.

Whether or not B's remainder, in the limitation discussed by Professor Gray, should be held to be vested, should depend upon the intent which the language of the limitation discloses to the court. If that intent is to give "seisin in law" and ownership at once, the remainder should be held to be vested; if the intent is to give B a "mere possibility" entitling him to ownership upon the termination of the preceding estate within his lifetime, the remainder should be held contingent. The wording of the limitation favors the first interpretation. Before the Statutes of Uses and of Wills, to hold B's interest to be a vested remainder would render the limitation to C void (as a limitation in defeasance of a vested estate); and this fact would doubtless have been a consideration to be taken into account in getting at the "net" intent expressed by such a limitation before those statutes raised new classes of future interests. Under those statutes the limitation to C gives him a shifting use or executory devise if the remainder to B is vested; so there seems now no consideration to prevent the courts interpreting the limitation to B literally; and this is what they have done. As the courts interpret the limitation to B, there is no condition either in law *or in fact* precedent to the *vesting in interest* of the remainder to B, though there necessarily is one *both in law and in fact* to the "coming into possession" of his estate.

orthodox view of contingent remainders to be that they are remainders subject to some sort of condition precedent *to vesting in possession.*

Am I wrong in concluding that Professor Kales has run into error because (1) he has not a clear conception of what is meant by the *vesting "in interest" of a remainder,* and therefore (2) has failed to grasp the distinction between a condition precedent to the vesting of a remainder and a condition precedent to its coming into possession?

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